

1994

# State of Utah v. Timothy C. Wilson : Brief of Appellee

Utah Court of Appeals

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Timothy C. Wilson; Attorney Pro Se.

Janice L. Frost; Assistant Attorney General; Jan Graham; Attorney General; Les Daroczi; Deputy Weber County Attorney; Attorneys for Appellee.

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff/Appellee, : Case No. 940087-CA  
v. :  
TIMOTHY C. WILSON. : Priority No. 2  
Defendant/Appellant. :

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BRIEF OF APPELLEE  
- - - - -

APPEAL FROM A JURY CONVICTION OF ATTEMPTED  
HOMICIDE, A SECOND DEGREE FELONY, IN  
VIOLATION OF UTAH CODE ANN §§ 76-4-101(1992)  
AND 76-5-203(1992), IN THE SECOND JUDICIAL  
DISTRICT, WEBER COUNTY, THE HONORABLE MICHAEL  
D. LYON, PRESIDING.

UTAH COURT OF APPEALS

UTAH

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DOCKET NO.

940087

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ORAL ARGUMENT IS NOT REQUIRED

**FILED**  
Utah Court of Appeals

MAR 01 1995

Marilyn M. Branch  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff/Appellee, : Case No. 940087-CA  
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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 940087-CA
v.	:	
TIMOTHY C. WILSON.	:	Priority No. 2
Defendant/Appellant.	:	

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BRIEF OF APPELLEE

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

Defendant, Timothy Wilson, appeals his judgment and conviction by a jury of attempted murder, a second degree felony, in violation of Utah Code Ann. §§ 76-4-101 (1992) and 76-5-203 (1992).<sup>1</sup>

This Court has jurisdiction under Utah Code § 78-2a-3(2)(f) (1994).

STATEMENT OF ISSUES AND STANDARDS OF APPELLATE REVIEW

Defendant raises two claims on appeal:

1. Whether Utah recognizes the crime of attempted second degree homicide; and,
2. Whether the jury instructions adequately defined the elements of attempted murder.

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<sup>1</sup> Defendant was also convicted of four misdemeanor charges arising out of the same incident. He does not challenge those convictions on appeal (R. 106-108, Addendum A).

However, defendant failed to properly preserve these claims, therefore, this Court should decline to consider them. State v. Brown, 856 P.2d 358, 359 (Utah App. 1993).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

**Utah Code Ann. § 76-4-101 (1992) Attempt-Elements of offense.**

(1) For purposes of this part a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense.

(2) For purposes of this part, conduct does not constitute a substantial step unless it is strongly corroborative of the actor's intent to commit the offense.

(3) No defense to the offense of attempt shall arise:

(a) Because the offense attempted was actually committed; or

(b) Due to factual or legal impossibility if the offense could have been committed had the attendant circumstances been as the actor believed them to be.

**Utah Code Ann. § 76-5-203 (1992) Murder**

(1) Criminal homicide constitutes murder if the actor:

(a) intentionally or knowingly causes the death of another;

....  
(2) Murder is a first degree felony.

STATEMENT OF THE CASE

Defendant was charged with one count of attempted murder, a second degree felony, in violation of Utah Code Ann. § 76-4-101 and § 76-5-203 (1992). The specific language of the charge was "Said defendant attempted to cause the death of A.

Weloth, intentionally and knowingly, and used a firearm in the commission of this offense." (R. 9-10). Defendant was convicted by a jury and sentenced to a term of one to fifteen years at the Utah State Prison (R. 106-108, Addendum A).<sup>2</sup>

#### STATEMENT OF FACTS

On April 3, 1993, Officers Felter and Weloth of the Ogden City Police received a dispatch requesting assistance from the South Salt Lake Police in locating defendant (T. 62). The officers were given defendant's physical description, the license plate number and description of the car defendant was seen driving, and three possible addresses where defendant might be located (T. 63-65). They were also advised to use caution in approaching defendant as he was known to be violent (T. 64-65). The police also discovered that defendant had an outstanding warrant in Ogden (T. 67).

Defendant was not located at either of the first two addresses (T. 65-66). The third address, 3501 Iowa #18, was a non-existent address. The only apartment complex in the area was at 3455 Iowa (T. 66). Weloth observed defendant's car in the parking lot at 3455 Iowa (T. 66). A woman was standing outside the building and the officers asked if she could direct them to apartment 18. She replied that it was her apartment and asked what they wanted. They told her they were looking for defendant

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<sup>2</sup> Defendant's misdemeanor sentences are to run concurrently with this sentence. He also received a one year enhancement for use of a firearm (R. 106, Addendum A).



to which she replied that he was her son and was inside talking on the phone (T. 70, 121).

When the two officers approached apartment 18, they could see defendant inside talking on the telephone (T. 70, 120-21). When defendant saw the uniformed officers he hung up (T. 70, 121-22). After establishing defendant's identity, the officers asked defendant to step outside to discuss a problem with the car (T. 71, 95, 122). Both officers testified that the purpose in asking defendant to come outside was for officer safety (T. 71, 123). Defendant refused to come out until the officers told him what they wanted so Officer Felter told defendant that they had a warrant for his arrest (T. 71-72, 123, 151).

At that point, defendant put his hands behind his back and started backing toward a doorway leading into the rest of the apartment (T. 73, 98, 124, 151). The officers each grabbed one of defendant's arms. He began struggling and they all fell to the ground (72-74, 126-27). During the struggle, defendant's mother got involved in the melee by hitting Felter on the back and trying to pull him off defendant (T. 74, 76, 104).

While Felter's attention was distracted by the mother, defendant somehow got a gun out of his back pocket (T. 75, 134). He pointed it at Officer Weloth's chest and put his finger on the trigger. Weloth yelled "gun", let go of defendant, and went for the gun (T. 75, 106, 134-37). The hammer of the gun was cocked. Weloth grabbed it and wrestled it away from defendant (T. 135-

37). When he later had the opportunity to inspect the gun, Officer Weloth found the safety off, the gun in the firing position with a round in the chamber, and a clip in the gun with four additional rounds (T. 138-39).

Defendant continued to struggle. During the struggle defendant punched Officer Weloth in the mouth and hit him again on the side of the head (T. 141-42). After defendant was handcuffed and subdued, the police found four knives concealed on defendant (T. 79-80).

#### SUMMARY OF ARGUMENTS

Defendant did not properly preserve his claims for appeal. He did not object to the charge or raise any claim below that attempted second degree murder for which he was being prosecuted was non-existent or unconstitutional. Further, defendant did not object to the jury instructions he now claims were deficient. Although defendant cites several cases, he does not provide any legal analysis nor does he provide any record cites. For all these reasons, the Court should summarily affirm defendant's conviction.

## ARGUMENT

### DEFENDANT DID NOT PRESERVE NOR ADEQUATELY BRIEF HIS CLAIMS ON APPEAL

#### **A. Defendant did not preserve his claims for appeal.**

On appeal defendant argues that there is no statutory crime of attempted murder under Utah Code Ann. § 76-5-203.<sup>3</sup> However, his challenge to the charge was not raised in the trial court. An appellate court will not consider issues raised for the first time on appeal absent plain error or exceptional circumstances. State v. Brown, 856 P.2d 358, 359 (Utah App. 1993); State v. Archambeau, 820 P.2d 920, 922 (Utah App. 1991). Because Utah has recognized attempted homicide as a crime, defendant cannot as a matter of law establish either plain error or exceptional circumstances.<sup>4</sup> Thus, this Court should refuse to consider this claim on appeal.

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<sup>3</sup> The State is aware of the Utah Supreme Court's ruling in State v. Vigil, 842 P.2d 843 (Utah 1992) holding that Utah does not recognize attempted second degree homicide under the depraved indifference alternative in Utah Code Ann. § 76-5-203(1)(c) (1991). Defendant does not raise a Vigil challenge. Moreover, defendant was charged under a different subsection, 76-5-203(1)(a), attempting to intentionally or knowingly cause the death of another.

<sup>4</sup> Defendant's claim is entirely without merit. Nowhere in his brief does defendant cite or acknowledge the existence of Utah's attempt statute in Utah Code Ann. § 76-4-101 (1992). Furthermore, Utah appellate courts have upheld several recent convictions for attempted homicide. State v. White, 246 Utah Adv. Rep. 19 (Utah App. 1994); State v. Labrum, 246 Utah Adv. Rep. 11 (Utah App. 1994); York v. Shulsen, 875 P.2d 590 (Utah App. 1994); State v. Deli, 861 P.2d 431 (Utah 1993); State v. Petersen, 810 P.2d 421 (Utah 1991).

Defendant also contends that the jury was not correctly instructed on the elements of attempted homicide.<sup>5</sup> No objection was raised to the jury instructions, therefore, this claim is also waived. State v. Alvarez, 872 P.2d 450, 460 (Utah 1994); Rule 12(d), Utah Code of Criminal Procedure.

**B. Defendant's claims are unsupported by legal analysis or citation to the record.**

On appeal, defendant cites a number of cases. However, he provides no legal analysis to support his assertions. Furthermore, defendant does not cite to the record anywhere in his brief. Accordingly, this Court should refuse to consider defendant's claims, and affirm his conviction. See State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984) ("Since the defendant fails to support [his] argument by any legal analysis or authority we decline to rule on it."); State v. Bishop, 753 P.2d 439, 450 (Utah 1988) ("[A] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research.") (footnote and citations omitted). See also State v. Garza, 820 P.2d 937, 939 (Utah App. 1991) (Utah App. 1991) ("[W]hen an appellant's argument contains no citations to the record and no legal authority, and as such does not comply with briefing rules," appellate courts will

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<sup>5</sup> This claim is also without merit. Instruction 14 (R. 56, Addendum B) sets out the elements of the crime and instruction 20 (R. 62, Addendum B) defines "intentionally" and "knowingly" as well as the definition of an attempt, using the statutory definition of attempt in section 76-4-101(1).

decline to reach the issue raised on appeal.); State v. Pursifull, 751 P.2d 825 n.1 (Utah App. 1988) (Failure to cite to the record constitutes an independent basis for affirming a conviction.).

CONCLUSION

Based on the foregoing, the State respectfully requests this Court to affirm defendant's conviction.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of March, 1995.

JAN GRAHAM  
Attorney General

Janice L. Frost  
JANICE L. FROST  
Assistant Attorney  
Criminal Appeals Division

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellee were mailed by first class mail this 1<sup>st</sup> day of March 1995 to:

Timothy C. Wilson  
P.O. Box 250  
Draper, Utah 84020

Attorney Pro Se

Janice L. Frost

ADDENDA

## ADDENDUM A

TE OF UTAH,  
Plaintiff,

INFORMATION

OTHY C. WILSON

Attorney No 93-0450F

Defendant.

-- 59/08/12

O.T.N.

te of Utah  
nty of Weber

ss.

Count IV

The undersigned complainant upon oath states that the  
plainant has reason to believe that the above named defendant on or about  
d day of April, 1993 in Weber County, State of Utah committed a

OND DEGREE FELONY, TO-WIT:

EMPTED MURDER, 76-4-101, 76-5-203, U.C.A.  
53) AS AMENDED, AS FOLLOWS:

D DEFENDANT ATTEMPTED TO CAUSE THE DEATH OF A. WELOTH,  
ENTIONALLY AND KNOWINGLY.

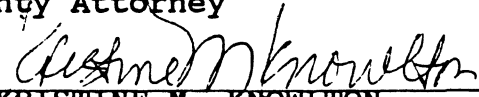
s information is based on evidence obtained from the following witnesses:

WELOTH  
FELTER

Authorized for presentment and filing:

MARK R. DeCARIA,  
County Attorney

By

  
KRISTINE M. KNOWLTON

scribed in my presence this 06th day of April , 1993

MAGISTRATE

esented and filed this 06th day of April , 1993

  
CLERK



( ) The within-named defendant, having waived examination of the offense(s) alleged in the within Information, IS ORDERED to be held to answer the same and be released on defendant's own recognizance.

---

JUDGE OF THE CIRCUIT COURT

( ) The within-named defendant, having waived examination of the offense(s) alleged in the within Information, IS ORDERED to be held to answer the same, be admitted to bail in the sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_), and be committed to the Sheriff of Weber County until the defendant gives such bail, or is legally discharged..

---

JUDGE OF THE CIRCUIT COURT

( ) It appearing to me that the offense(s) alleged in the within Information has/have been committed and that there is sufficient cause to believe the within-named defendant committed the same. I ORDER the defendant to be held to answer the same and to be released on the defendant's own recognizance.

---

JUDGE OF THE CIRCUIT COURT

(☒) It appearing to me that the offense(s) alleged in the within Information has/have been committed and that there is sufficient cause to believe the within-named defendant committed the same. I ORDER the defendant to be held to answer the same, be admitted to bail in the sum of Five Thousand Nine Hundred Dollars (\$ 5900.00), and be committed to the Sheriff of Weber County until the defendant gives such bail, or is legally discharged.



---

JUDGE OF THE CIRCUIT COURT

( ) There not being sufficient cause to believe the within-named defendant committed the offense(s) alleged in the within Information, I ORDER the defendant discharged.

---

JUDGE OF THE CIRCUIT COURT

DISTRICT COURT  
WEBER COUNTY

1994 JAN 11 AM 8 56  
IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY  
STATE OF UTAH

STATE OF UTAH,	)	
	(	JUDGMENT/SENTENCE AND
Plaintiff,		COMMITMENT TO UTAH STATE
vs.	)	PRISON
	(	
TIMOTHY C. WILSON,		Case No. 931900340
	)	
Defendant.	(	

JAN 11 1994

The defendant appeared in court for sentencing after conviction of the offenses of  
 Count I, attempted murder, a second degree felony,  
 Count II, assault against a police officer, a Class A misdemeanor,  
 Count III, carrying a concealed dangerous weapon, a Class A misdemeanor,  
 Count IV, carrying a concealed dangerous weapon, a Class B misdemeanor,  
 Count V, interfering in arrest by police officer, a Class B misdemeanor, by

☒ jury.  
☐ court.  
☐ plea of guilty.  
☐ plea of no contest.

The defendant is adjudged guilty of this offense and is sentenced as follows:

Basic Sentence  
Count I

Defendant's initials

	<input type="checkbox"/>	Not to exceed five years at the Utah State Prison.
<u>MDL</u>	<input checked="" type="checkbox"/>	Not less than one year nor more than 15 years at the Utah State Prison.
	<input type="checkbox"/>	Not less than five years and which may be for life at the Utah State Prison.
<u>MDL</u>	<input checked="" type="checkbox"/>	Sentence to run
	<input type="checkbox"/>	consecutive.
	<input checked="" type="checkbox"/>	concurrent with Counts II, III, IV, and V.
<u>MDL</u>	<input checked="" type="checkbox"/>	One year at Utah State Prison, pursuant to 76-3-203(1), (2) or (3).
		This enhanced sentence is to run consecutive to the basic sentence.
<u>MDL</u>	<input checked="" type="checkbox"/>	Fine of <u>\$1500.00</u> and state surcharge of <u>\$1275.00</u> , for a total of <u>\$2775.00</u> .

MDL [X] The court recommends to the Board of Pardons that the defendant receives credit for  
[X] time previously served.

Count II

Judge's initials

MDL [X] Not to exceed one year in the Weber County Jail.  
— [ ] Not less than one year nor more than 15 years at the Utah State Prison  
— [ ] Not less than five years and which may be for life at the Utah State Prison  
MDL [X] Sentence to run  
[ ] consecutive.  
[X] concurrent with Counts I, III, IV and V.  
MDL [X] The court recommends to the Board of Pardons that the defendant receives credit for  
[X] time previously served.  
[ ] \*\* days.

Count III

Judge's initials

MDL [X] Not to exceed one year in the Weber County Jail.  
— [ ] Not less than one year nor more than 15 years at the Utah State Prison.  
— [ ] Not less than five years and which may be for life at the Utah State Prison.  
MDL [X] Sentence to run  
[ ] consecutive.  
[X] concurrent with Counts I, II, IV and V.  
MDL [X] The court recommends to the Board of Pardons that the defendant receives credit for  
[X] time previously served.  
[ ] \*\* days.

Count IV

Judge's initials

MDL [X] Not to exceed one year in the Weber County Jail.  
— [ ] Not less than one year nor more than 15 years at the Utah State Prison.  
— [ ] Not less than five years and which may be for life at the Utah State Prison.

MDL [X] Sentence to run  
[ ] consecutive.  
[X] concurrent with Counts I, II, III, and V.  
MDL [X] The court recommends to the Board of Pardons that the defendant receives credit for  
[X] time previously served.  
[ ] \*\* days.

Count V

Judge's initials

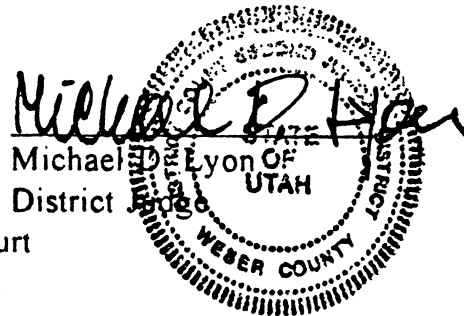
MDL [X] Not to exceed six months in the Weber County Jail.  
[ ] Not less than one year nor more than 15 years at the Utah State Prison.  
[ ] Not less than five years and which may be for life at the Utah State Prison.  
MDL [X] Sentence to run  
[ ] consecutive.  
[X] concurrent with Counts I, II, III, and IV.  
MDL [X] The court recommends to the Board of Pardons that the defendant receives credit for  
[X] time previously served  
[ ] \*\* days.

Commitment

The defendant is remanded into the custody of :  
MDL [X] The sheriff of Weber County for delivery to the warden of the Utah State Prison for execution of the sentence.  
[ ] The warden of the Utah State Prison for execution of this sentence.

Dated this 11th day of January, 1994.

ATTEST: PAULA CARR, Clerk of the Court  
BY: Maureen Magagna, Deputy Clerk



COMMITMENT ORDER FOR  
WILLIAM J. JENNIFER C.  
F. 1st MURDER MH - 1st MURDER P.O. 1st MURDER P.O. 1st MURDER P.O.  
CHARGE MB - 1st MURDER P.O. 1st MURDER P.O. 1st MURDER P.O.  
DATE 1/14/94 CASE NO. 931900340

'94 JAN 11 PM 3 41

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IN THE SECOND JUDICIAL DISTRICT COURT  
WEBER COUNTY, STATE OF UTAH

---

STATE OF UTAH,	)	
	)	JUDGMENT
Plaintiff,	)	OF CONVICTION
vs.	)	Case No. 931900340
TIMOTHY C. WILSON,	)	Dean Olsen, Reporter
Defendant.	)	Maureen Magagna, Clerk

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JAN 12 1994

The defendant appeared before the court on January 6, 1994, for sentencing on a jury finding of guilty to one count of attempted murder, a second degree felony; one count of assault against a police officer, a Class A misdemeanor; one count of carrying a concealed dangerous weapon, a Class A misdemeanor; one count of carrying a concealed dangerous weapon, a Class B misdemeanor; and one count of interfering in arrest by police officer, a Class B misdemeanor. He was represented by Stephen W. Farr and John T. Caine. Gary Heward appeared for the State.

It is the judgment and sentence of the court that the defendant serve a term of one to fifteen years in the Utah State Prison on the second degree felony, with a one year consecutive penalty enhancement in the Utah State Prison for the use of a firearm. The defendant shall serve a term of one year jail on the Class A misdemeanor assault, one year jail on the Class A misdemeanor carrying a concealed dangerous weapon, one year jail

State v. Wilson  
Case 931900340  
Page Two

on the Class B misdemeanor carrying a concealed dangerous weapon,  
and six months jail on the Class B interfering in arrest, all  
concurrently.

The defendant shall pay a fine of \$1500.00, plus a state  
surcharge of \$1275.00, for a total fine of \$2775.00.

The court recommends that defendant's previous jail time  
be credited towards his prison sentence.

Dated this 11 day of January, 1994.

  
JUDGE MICHAEL D. LYON

## ADDENDUM B



INSTRUCTION NO. 14

Before you can convict the defendant of the crime of count I - attempted murder, a second degree felony, you must find from the evidence, beyond a reasonable doubt, all of the following elements of that crime:

- 1) Said defendant, Timothy C. Wilson,
- 2) intentionally and knowingly,
- 3) attempted to cause the death of A. Weloth.

If you believe that the evidence established each of the essential elements of the offense beyond a reasonable doubt, it is your duty to convict the defendant. On the other hand, if you believe the State has failed to prove one or more of the above elements, you are to consider whether the offense of aggravated assault, a third degree felony, was committed.

INSTRUCTION NO. 20

A person engages in conduct:

(1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

(2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

A person is guilty of an "attempt" to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense.